

79-644

Supreme Court, U.S.
FILED

OCT 18 1979

CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. A-138

ATELIERS ROANNAIS DE CONSTRUCTIONS
TEXTILES and ARCT, INCORPORATED,

Petitioners,

v.

THE DUPLAN CORPORATION, *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

GRANVILLE M. BRUMBAUGH
JAMES N. BUCKNER
GRANVILLE M. BRUMBAUGH, JR.
BRUMBAUGH, GRAVES, DONOHUE
& RAYMOND
30 Rockefeller Plaza
New York, New York 10020
(212) 489-3310

ARTHUR O. COOKE
COOKE & COOKE
P.O. Box 187
Greensboro, N. C. 27402
(919) 272-4514

Attorneys for Petitioners

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provision Involved	3
Statement of the Case	4
The Proceedings Below	4
The Parties	4
The Leesona Litigation	6
The Leesona Settlement	7
Reasons for Granting the Writ	7
Scope of the Petition	8
The Need for Clarification	8
The Gypsum and Zenith Decisions	9
The Conflicting Viewpoints	10
The Direct Conflict Between the Respective Find- ings of the Courts Below	14
Participation in the "Scheme"	18
Conclusion	19

TABLE OF AUTHORITIES

	PAGE
Cases:	
Burgess v. M/V Tamano, 564 F.2d 964, 976 (1st Cir. 1977), <i>cert. den.</i> 435 U.S. 941 (1978)	11
Daniels v. Hadley Memorial Hospital, 566 F.2d 749, 756-757 (CA D.C. 1977)	13
Evans v. United States, 319 F.2d 751 (1st Cir. 1963)	11
First National Bank v. Cities Service, 391 U.S. 253, 285-288 (1968)	18
Glascock v. United States, 323 F.2d 589, 591 (4th Cir. 1963)	12
Gowdy v. United States, 412 F.2d 525, 532-533 (6th Cir. 1969), <i>cert. den.</i> 396 U.S. 960 (1969), <i>reh. den.</i> 396 U.S. 1063 (1970)	13
Jones v. Pitt County Board of Education, 528 F.2d 414, 418 (4th Cir. 1975)	11, 12, 13
Kennedy Park Homes Association, Inc. v. City of Lackawanna, New York, 436 F.2d 108, 112 (2nd Cir. 1970), <i>cert. den.</i> 401 U.S. 1010 (1971)	11
Krasnov et al. v. Dinan, 465 F.2d 1298, 1302-03 (3rd Cir. 1972)	12
McAllister v. United States, 348 U.S. 19 (1954)	10
N.L.R.B. v. Sequoia District Council of Carpenters, 568 F.2d 628, 631 (9th Cir. 1977)	13
Onego Corporation v. United States, 295 F.2d 461, 463 (C.A. 10th 1961)	10

	PAGE
Pampillonia v. Concord Line, A/S, 536 F.2d 476, 477, note 2 (2nd Cir. 1976)	11
Purer & Co. v. Aktiebolaget Addo, 410 F.2d 871, 878 (9th Cir. 1969), <i>cert. den.</i> 396 U.S. 834 (1969)	13
Reading Company v. Dredge Delaware Valley, 468 F.2d 1161 (3rd Cir. 1972)	12
Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al., 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954)	18
Tittle v. Aldacosta, 544 F.2d 752, 754 (5th Cir. 1977)	13
United States v. City of Bellevue, Nebraska, 474 F.2d 473, 475 (8th Cir. 1973), <i>cert. den.</i> 414 U.S. 827 (1973)	13
United States v. City of Chicago, 549 F.2d 415, 429-430 (C.A. 7th 1977), <i>cert. den.</i> 434 U.S. 875 (1977)	13
United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)	9
United States v. Wilshire Oil Company of Texas, 427 F.2d 969 (10th Cir. 1970)	16
West American Insurance Co. v. Allstate Insurance Co., 295 F.2d 513, 515 (10th Cir. 1961)	13
In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127 (5th Cir. 1976)	5, 6
Zenith Radio Corp. v. Hazeltine Research, Inc. et al., 395 U.S. 100, 123 (1969)	9
Statutes:	
28 U.S.C. §1254	2
Rule 52(a) of the Federal Rules of Civil Procedure	3

IN THE
Supreme Court of the United States
October Term, 1979

No. A-138

ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES
and ARCT, INCORPORATED,
Petitioners,
v.
THE DUPLAN CORPORATION, *et al.*,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioners Ateliers Roannais de Constructions Textiles ("ARCT-France") and ARCT, Inc., respectively, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 26, 1979, affirming in part and reversing in part the judgment of the District Court for the District of South Carolina, Spartanburg Division.

Opinions Below

The two page *per curiam* opinion of the Court of Appeals dated March 26, 1979, reported as *Duplan Corp. et al. v. Deering Milliken, Inc. et al.*, 594 F.2d 979, is reproduced in the Appendix hereto at A413 to A418.* The 123 page opinion of the District Court, dated July 29, 1977, reported at 444 F.Supp. 648, is reproduced at A1 to A279.

Jurisdiction

The opinion and judgment of the Court of Appeals was entered on March 26, 1979. A timely petition for rehearing was denied on May 29, 1979 and this petition for writ of certiorari is filed prior to October 22, 1979, the date to which petitioners' time for filing was extended by this Court's Order of September 21, 1979. This Court has jurisdiction to review the opinion and judgment of the Court of Appeals by writ of certiorari under Title 28 U.S.C. §1254.

Question Presented**

Under Rule 52(a) of the Federal Rules of Civil Procedure, may the Court of Appeals ignore findings of fact

* All parties before the Court of Appeals in this proceeding are filing petitions for writ of certiorari and the references herein are to pages of the Joint Appendix filed concurrently herewith on behalf of such parties.

** The questions presented in the petition for writ of certiorari filed concurrently herewith by petitioners' co-defendants Deering Milliken, Inc. (DMI), Deering Milliken Research Corporation (DMRC) and Moulinage et Retorderie de Chavanoz (Chavanoz) are also applicable here and petitioners refer to such co-defendants' petition for discussion of such questions.

made by the District Court and the substantial evidence on which such findings are based and, without determining that such findings are clearly erroneous or without concluding upon the entire evidence that a mistake has been committed, make findings *de novo* which are in direct conflict with the trial court findings?

Statutory Provision Involved

This case involves the construction and application of Rule 52(a) of the Federal Rules of Civil Procedure which is as follows:

“(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).”

Statement of the Case

The Proceedings Below

This petition is from the decision of the Court of Appeals for the Fourth Circuit (A413 to A418) affirming in part and reversing in part the judgment of the District Court for the District of South Carolina, Spartanburg Division.

After 91 trial days, the District Court, sitting without a jury, held that the petitioners did not have knowledge of and did not participate in a horizontal combination and conspiracy which was found to exist between the other defendants and the Leesona Corporation ("Leesona").

Although lauding the District Court's opinion as "admirably comprehensive in its detail of the facts and its discussion of the proof" (A416) and noting also that the inferences drawn by the District Court "are warranted and fair" (A416), the Court of Appeals, in a short *per curiam* decision, proceeded to reverse the judgment of the District Court in favor of petitioners, supporting such reversal on new findings to the effect that petitioners had knowingly participated in the horizontal conspiracy by reason of knowledge imputed to them in respect to an agreement settling litigation.

The Parties

Petitioner ARCT-France is a French textile machinery manufacturer which made and sold the so-called FT machines involved in the proceedings below.* Petitioner

* The function of the FT machine is to impart a permanent crimp to synthetic thermoplastic yarns by a method known as "false twist" which involves a continuous process wherein the yarn is twisted, heated in its twisted state, cooled and then untwisted. A number of features of the FT machine were covered by patents owned and licensed by co-defendant Chavanoz.

ARCT, Inc., a North Carolina corporation and a subsidiary of ARCT-France, is the United States distributor of textile machines manufactured by ARCT-France. Henri Crouzet, a citizen and resident of France, was, at all times involved, the President of both petitioners, and Robert F. Waters, a United States citizen, was Vice President and General Manager of ARCT, Inc.

Since 1954, petitioner ARCT-France has manufactured and sold the FT machines under a patent license granted by co-defendant Chavanoz. This license was limited and excluded the right to use the machines under the Chavanoz patents. The reserved use rights for the United States were separately licensed by Chavanoz to co-defendant DMRC. Under the terms of its license from Chavanoz, ARCT-France was obligated to sell its machines in the United States only to concerns holding a use license from DMRC* and such concerns included all of the respondents herein.**

From 1959 until the formation of petitioner ARCT, Inc. in 1966, the United States distributor of ARCT-France

* This restriction, which was attacked by respondents (the plaintiffs below) as an unlawful vertical restraint, was upheld by the District Court below and by the Court of Appeals. A similar restriction was also held valid by the Court of Appeals for the Fifth Circuit in *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976).

** Respondents purchased FT machines from Whiting and ARCT, Inc. and used such machines under royalty-bearing licenses granted by DMRC. Respondents are the following companies: The Duplan Corporation, Burlington Industries, Inc., Dixie Yarns, Inc., Frank Ix & Sons Virginia Corp., Hemmerich Industries, Inc., Jonathan Logan, Inc., Leon-Ferenbach, Inc., National Spinning Company, Inc., Olympia Industries, Inc., Reliable Silk Dyeing Co., Inc., Schwarzenbach-Huber Co., Spring-Tex, Inc., Texelastex Corporation, Texfi Industries, Inc. and United Merchants & Manufacturers, Inc.

was Whitin Machine Works of Whitinsville, Massachusetts ("Whitin") and Robert F. Waters, then an employee of Whitin, was in charge of the sales of FT machines. Although not a party in the proceedings below, Whitin was named as a co-conspirator by respondents.

Leesona, having its principal place of business near Providence, Rhode Island, manufactured and sold similar textile machinery in the United States and abroad in competition with ARCT-France. Such machinery was sold by Leesona on condition that each purchaser accept a royalty-bearing use license under Leesona's patents. Leesona was also found by the District Court to be a co-conspirator with defendants Chavanoz, DMRC and DMI (A263-4).

The Leesona Litigation

In and after 1959 two separate and distinct licensing programs existed under patents relating to false twist machinery. In one program Leesona licensed the use of machinery manufactured by it, and later, machinery manufactured by parties other than ARCT-France as well.* The other was the program of DMRC which licensed the use of FT machines manufactured by ARCT-France.

Following delivery and installation of one of the first FT machines imported into the United States, Leesona instituted a patent infringement action against the purchaser, a licensee of DMRC under the Chavanoz patents, and DMRC promptly came to the defense of its licensee. Thus, from the very beginning of the marketing of ARCT-France's machines in the United States, the two competing

* See *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976).

patent licensors, DMRC and Leesona, were locked in a struggle to determine the infringement and validity of Leesona's United States patents.

The Leesona Settlement

At various times during the pendency of the Leesona litigation there were settlement discussions with Leesona, but it was not until early in 1964 that the parties were able to come to an agreement.

The settlement was evidenced by agreement dated as of March 31, 1964 (A56). The formal documents involved in the settlement were signed on behalf of ARCT-France by Leo Soep as attorney in fact. At that time, Leo Soep, a French patent agent ("conseil en brevets"), was a full time employee of an affiliate of Chavanoz and was the Chavanoz representative at the settlement.*

Reasons for Granting the Writ

This petition presents an instance of complete disregard of the mandate of Rule 52(a), Federal Rules of Civil Procedure,** and emphasizes the need for judicial clarification of the mandate of such Rule.

The Court of Appeals substituted its judgment for that of the District Court by making *de novo* findings on

* The District Court expressly found that in representing both Chavanoz and ARCT-France, Soep was involved in a conflict of interest situation and held Soep's knowledge was not imputable to ARCT-France (A80).

** Rule 52(a) provides in part: "... Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. ..."

crucial issues. It then relied upon these findings to reverse the trial court which had made diametrically opposite findings on the same issues to support its decision exonerating petitioners as participants in the horizontal antitrust conspiracy. This "setting aside" of the findings of fact of the District Court was done without determination that the conflicting findings were "clearly erroneous" or that upon the entire evidence a mistake had been committed.

Both the District Court and the Court of Appeals concede, as they must, that knowledge of the conspiratorial purpose and effect of the 1964 Leeson settlement agreement is an essential element to a finding of participation in the horizontal conspiracy (A80-1, A417). Attributing such culpable knowledge to petitioners was the crux of the decision of the Court of Appeals. On this factual issue the appellate court is in direct and irreconcilable conflict with the express findings of fact made by the trial court.

Scope of the Petition

This petition will (1) demonstrate the need for a clarification by this Court to eliminate the existing confusion and diversity in respect of the scope and application of Rule 52(a), Federal Rules of Civil Procedure, and (2) illustrate wherein the *per curiam* opinion of the Court of Appeals is in direct conflict with detailed findings of fact made by the District Court.

The Need for Clarification

It is submitted that the action taken by the Court of Appeals in this proceeding is the inevitable result of the

confusion and diversity presently existing among the circuits respecting the deference to be paid to the trier of the facts.

The *Gypsum* and *Zenith* Decisions

In 1948 this Court, in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), held:

" . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*id.* at p. 395).

The definition pronounced in *Gypsum* did not result in uniform application of Rule 52(a) but, on the contrary, seemed to encourage the circuit courts to make new findings upon a subjective determination that a mistake had been made. Accordingly, ten years later this Court again addressed itself to this question, saying:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo* . . . The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)." (*Zenith Radio Corp. v. Hazeltine Research, Inc. et al.*, 395 U.S. 100, 123 (1969)).

Zenith, however, has failed to evoke any degree of uniformity and at least two inconsistent rules are followed

in determining whether or not the trial court's findings are to be set aside as "clearly erroneous."

The Conflicting Viewpoints

In a number of circuits the rule applied is that findings supported by substantial evidence will not be set aside even though the appellate court would have made different findings on the same evidence.* In other circuits, however, the appellate court would make its own findings, despite the presence of substantial evidence supporting the trial court's findings, if the reviewing court is left with the definite and firm conviction that a mistake has been committed.**

The two conflicting rules have been concisely stated as follows:

"It is fundamental and without dispute in the law that an appellate court will not set aside the judgment of a trial court, based upon findings of fact, unless there is in its judgment no substantial evidence in the record supporting the court's findings. . . ." (*Onego Corporation v. United States*, 295 F.2d 461, 463 (C.A. 10th 1961)).

"We recognize that we are not bound by the factual determinations of the district court merely because

* The "substantial evidence" rule presents an objective standard for determining whether or not the trial court's findings are "clearly erroneous". Such rule has also been followed by this Court. As stated in *McAllister v. United States*, 348 U.S. 19 (1954) ". . . We cannot say in review that a judgment based upon such [substantial] evidence is clearly erroneous" (*id.* p. 22).

** As demonstrated by the decision of the Court of Appeals in this proceeding, this rule permits the appellate court to assume a major fact finding function in spite of the clearly contrary intent of Rule 52(a) and the pronouncements of this Court.

they are supported by substantial evidence, and that a finding may be rejected as 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*Jones v. Pitt County Board of Education*, 528 F.2d 414, 418 (4th Cir. 1975)).

A brief review of the current situation demonstrates the lack of uniformity among the appellate courts in applying Rule 52(a) to the factual findings of the trial court.

In the First Circuit the rule presently is that ". . . the test is not whether there can be found 'substantial evidence' supporting the conclusion . . . Rather, the question is whether, on the record as a whole, the appellate court views the conclusion as clearly erroneous . . ." (*Burgess v. M/V Tamano*, 564 F.2d 964, 976 (1st Cir. 1977), *cert. den.* 435 U.S. 941 (1978)).*

The Second Circuit appears to straddle both viewpoints, holding that findings supported by substantial evidence will not be disturbed (*Kennedy Park Homes Association, Inc. v. City of Lackawanna, New York*, 436 F.2d 108, 112 (2nd Cir. 1970), *cert. den.* 401 U.S. 1010 (1971)) unless "clearly erroneous" (*Pampillonia v. Concord Line, A/S*, 536 F.2d 476, 477, note 2 (2nd Cir. 1976)).

The Court of Appeals for the Third Circuit has steadfastly upheld the trial court's findings if they are supported by substantial evidence. In somewhat more precise language than is usually found, that court has said:

* But compare with *Evans v. United States*, 319 F.2d 751 (1st Cir. 1963) where the Court stated: "It is settled that an appellate court has no power to disturb a finding of fact of a trial court where it is based on some substantial though conflicting evidence" (*id.* p. 753).

“... It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system...” (*Krasnov et al v. Dinan*, 465 F.2d 1298, 1302-03 (3rd Cir. 1972))*

The present practice in the Fourth Circuit, if the decision below is considered, would seem to be a total disregard for Rule 52(a) because there the appellate court made new findings completely inconsistent with the findings of the trial court, without regard to the entire evidence and without determining whether and to what extent the trial court's findings were “clearly erroneous” on the basis of the evidence. Prior to this decision, the Fourth Circuit generally followed the rule of the First Circuit that findings based upon substantial evidence may nevertheless be set aside if considered “clearly erroneous” (*Jones v. Pitt County Board of Education*, 528 F.2d 414, 418 (4th Cir. 1975)).**

* See *Reading Company v. Dredge Delaware Valley*, 468 F.2d 1161 (3rd Cir. 1972), where the court said: “We have carefully reviewed the record and are satisfied that the findings of fact . . . are supported by substantial evidence.” (*id.* p. 1164).

** In *Glasscock v. United States*, 323 F.2d 589, 591 (4th Cir. 1963), the Fourth Circuit appeared to follow the rule that findings based upon substantial evidence will not be set aside, but in *Jones v.*

(footnote continued on next page)

In the Fifth and Sixth Circuits and in the District of Columbia, the appellate courts apparently will not hesitate to set aside the findings of the trial court supported by substantial evidence if in their view an error has been committed (*Tittle v. Aldacosta*, 544 F.2d 752, 754 (5th Cir. 1977); *Gowdy v. United States*, 412 F.2d 525, 532-533 (6th Cir. 1969), *cert. den.* 396 U.S. 960 (1969), *reh. den.* 396 U.S. 1063 (1970); *Daniels v. Hadley Memorial Hospital*, 566 F.2d 749, 756-757 (CA D.C. 1977)).

In contrast, the appellate courts in the Seventh, Eighth, Ninth and Tenth Circuits adhere to the principle that findings of fact are not to be considered “clearly erroneous” if there is substantial evidence to support them (*United States v. City of Chicago*, 549 F.2d 415, 429-430 (C.A. 7th 1977), *cert. den.* 434 U.S. 875 (1977); *United States v. City of Bellevue, Nebraska*, 474 F.2d 473, 475 (8th Cir. 1973), *cert. den.* 414 U.S. 827 (1973); *Purer & Co. v. Aktiebolaget Addo*, 410 F.2d 871, 878 (9th Cir. 1969), *cert. den.* 396 U.S. 834 (1969);* *West American Insurance Co. v. Allstate Insurance Co.*, 295 F.2d 513, 515 (10th Cir. 1961).

The need for a uniform application of Rule 52(a) is obviously in the interest of the orderly administration of justice. The success or failure of a litigant should not depend upon the policy of a particular circuit with respect to the deference to be paid to the factual findings of the trial court.

Pitt County Board of Education, *supra*, this rule was clearly abandoned. The Court said: “Several circuits subscribe to the proposition that a finding that is supported by substantial evidence cannot be clearly erroneous. . . . we think the prevailing rule in this circuit is to the contrary.” (*id.* at 418, note 9).

* But see *N.L.R.B. v. Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977).

The Direct Conflict Between the Respective Findings of the Courts Below

The District Court found that the 1964 Settlement Agreement was not unlawful *per se*, characterizing it as follows:

“... While on its face the agreement would not seem to offend the antitrust laws, when considered in the light of the surrounding circumstances and the actions of the parties* both before and after its execution, the conclusion is that the agreement was anti-competitive and a restraint on interstate commerce in violation of Section 1 of the Sherman Act” (A66-7)

Although not making a separate finding in this regard, the Court of Appeals substantially overstated the District Court's finding:

“The District Court found that the 1964 Settlement Agreement was the core of a scheme to stabilize and maintain production royalties on false-twist machines and to monopolize the U.S. market for these machines.” (A417)

On the basis of substantial evidence, the District Court expressly found that the petitioners had no knowledge of any anticompetitive effect of the settlement and that the only reason settlement was desired by ARCT-France was to secure freedom to manufacture and sell FT machines and to remove the uncertainty and financial risk of a lawsuit (A79-81, A387, A396).

Notwithstanding the detailed findings by the District Court exculpating petitioners from wrongdoing, the Court

* “The parties” referred to by the District Court did not include either of the petitioners.

of Appeals undertook to fix petitioners with knowledge of the “anti-competitive” nature of the agreement, disregarding the substantial evidence which the trial court had considered.

For example, the Court of Appeals had before it the following finding from Judge Dupree's opinion:

“The fact that ARCT-France was actually a party to the Leeson Settlement Agreements is regarded as having little probative force. It was not a party to the United States litigation but was, of course, involved in litigation in France which the settlement encompassed. It was represented here by Leo Soep, the ubiquitous ‘conseil en brevets,’ who signed the agreement for ARCT-France as attorney-in-fact. Soep also signed for Chavanoz for whom he had been the chief negotiator. There is no evidence that Henri Crouzet, ARCT-France's president and chief executive officer, had any part in the negotiations. His limited skill in English makes it unlikely that he had sufficient understanding of the proceedings in the United States to form any intent concerning a conspiracy.” (A80)*

Notwithstanding such finding, the Court of Appeals imputed culpable knowledge to ARCT-France on the basis of the following:

“ARCT-France participated in the settlement negotiations through a representative, signed the final agreement” (A417)

Again, disregard of the mandate of Rule 52(a) is shown when the Court of Appeals attached culpable sig-

* See Finding of Fact No. 48 (A395-6) which details the basis for this statement.

nificance to the "at least peripheral participation" (A417) by Robert F. Waters in the settlement negotiations.* Reliance upon this "participation" to impute knowledge to petitioners is unjustified in view of the evidence respecting Waters' contact with the 1964 settlement. On the basis of the evidence, the trial court found:

"22. Waters was in charge of the false-twist machinery sales for Whitin but was not a part of the management, and although he attended two meetings at which unproductive settlement negotiation discussions occurred, there is no evidence that he had any part in the final negotiations which resulted in settlement or that he understood the anti-competitive import of the agreements finally reached. Thus, it cannot be said that he brought with him to ARCT, Inc. any guilty knowledge of the conspiracy. See *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir. 1970)." (A79)**

The Court of Appeals further disregarded the findings of the trial judge when it attempted to attach culpable knowledge and intent to petitioners through the "ubiquitous" Leo Soep.† The appellate court apparently conceived of Soep as a conduit through whom guilty knowledge of the purpose and intent of the 1964 settlement could be attributed to petitioners. As a "conseil en brevets," his allegiance for years had been to Chavanoz. He was chief negotiator for the Chavanoz interest which was to preserve

* Waters testified extensively at the trial and the District Court even found that he did not see a copy of the agreement until deposed in this litigation in 1970 (A389).

** This portion of Judge Dupree's opinion was predicated upon his exhaustive Finding of Fact No. 43 (A388-9).

† The Court referred to Soep as the ARCT-France representative (A417):

the royalty program. This, of course, included the continued sale of ARCT machinery in the United States in order to have machinery in the field to be licensed by Chavanoz and DMRC. The trial court portrayed Soep's role in the following manner:

"Moreover, Soep's guilty knowledge and intent, if any, were not necessarily imputable to ARCT-France, for his primary allegiance for years had been to Chavanoz and in this instance he was in a conflict of interest situation. Chavanoz's sole interest in the settlement was to preserve the production royalty program. On the other hand, ARCT-France's sole interest was in selling machines, an endeavor for which the DMRC-Chavanoz licensing program posed a constant impediment." (A80)

The complete disregard of the mandate of Rule 52(a), Federal Rules of Civil Procedure, appears in the sweeping assertion which prefaces the "*per curiam*" opinion of the Court of Appeals:

"... The evidence is clear and conclusive that these defendants [petitioners] were active, knowing participants in the horizontal conspiracy." (A416)

This indictment by the Court of Appeals cannot be reconciled with the factual findings of Judge Dupree, who, after the ninety-one day trial, concluded from the evidence as follows:

"The conclusion is that the requisite intent to violate the antitrust laws on the part of ARCT-France in entering into the Leeson settlement agreement and its actions subsequent thereto have not been made to appear by a preponderance of the evidence. . . . Similarly, proof is lacking that ARCT, Inc. knew of

the existence of the conspiracy and consciously committed itself to the common scheme with intent to pursue its objectives. . . .”* (A80-1)

Participation in the “Scheme”

Lastly, the Court of Appeals undertook to impute to petitioners knowledge of the conspiracy by finding that in order for the horizontal conspiracy to be successful, petitioners’ cooperation was essential.** This boot strap reasoning assumes that petitioners were aware of the existence of the alleged “scheme,” an awareness which the trial judge expressly found did not exist (A79-81, A396). The record is devoid of evidence that ARCT-France or ARCT, Inc. were ever privy to any understanding respecting the stabilization of competitive production royalties.† Furthermore, the restriction on deliveries of FT machines to DMRC’s use licensees is no evidence of petitioners’ knowledge or participation since such restriction was a condition in the manufacturing license received by ARCT-France from Chavanoz and had been in effect and observed for more than four years prior to the 1964 Settlement Agreement.

* It should be noted that Judge Dupree, in making this finding, followed the law as set forth by this Court in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954) (A63, A81), which the Court of Appeals appears to have completely overlooked.

** The Court of Appeals stated: “Both ARCT-France and ARCT, Inc. knew that their co-operation was essential to successful operation of the scheme, and they gave that co-operation . . .” (A417-8).

† Moreover, production royalties were not petitioners’ concern since, as the District Court found, petitioners never received any part of them (A79-80, A405). The trial court’s refusal to infer that petitioners knew of and participated in the horizontal conspiracy in view of the fact that no benefits from such conspiracy were to be obtained by them is squarely supported by *First National Bank v. Cities Service*, 391 U.S. 253, 285-288 (1968).

The flagrant disregard by the Court of Appeals of the mandate of Rule 52(a) and the findings specifically made by the trial judge and painstakingly incorporated in his “thorough, explicit and sound” opinion (A416) serves to emphasize the need for this Court to exercise its power of supervision and provide a definitive guideline for appellate courts so that Rule 52(a) will be given meaningful and uniform application.

Conclusion

For the foregoing reasons, petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

GRANVILLE M. BRUMBAUGH
JAMES N. BUCKNER
GRANVILLE M. BRUMBAUGH, JR.
BRUMBAUGH, GRAVES, DONOHUE
& RAYMOND
30 Rockefeller Plaza
New York, New York 10020
(212) 489-3310

ARTHUR O. COOKE
COOKE & COOKE
P.O. Box 187
Greensboro, N. C. 27402
(919) 272-4514

Attorneys for Petitioners

IN THE
Supreme Court of the United States

October Term, 1979

No. 79-644

ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES
and ARCT, INCORPORATED,

Petitioners,

v.

THE DUPLAN CORPORATION, *et al.*,

Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

DAVID L. FOSTER
WILLKIE FARR & GALLAGHER
153 East 53rd Street
New York, New York 10022
(212) 935-8000

MCNEILL SMITH
SMITH MOORE SMITH
SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450

Attorneys for Respondents

Of Counsel:

MICHAEL R. ABEL
MICHAEL C. LAMBERT
JAMES J. CALDER
JOHN W. MALLEY
WILLIAM K. WEST, JR.
W. WARREN TALTAUVLL
PAUL B. BELL
CHARLES B. PARK
JOHN J. BARNHARDT, III
DAVID RABIN

TABLE OF CONTENTS

	PAGE
Opinions Below	4
Question Presented	4
Statement of the Case	4
Reasons Why the Writ Should Be Denied	9
I. The Decision of the Fourth Circuit Court of Appeals Does Not Raise the Question Presented in the Petition	9
II. There Is No Conflict Among the Circuits Con- cerning the Scope and Application of Rule 52(a)	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Albrecht v. Herald Co.</i> , 390 U.S. 145 (1968)	7
<i>Eitel v. Schmidlapp</i> , 459 F.2d 609 (4th Cir. 1972)	7
<i>Hays v. United Fireworks Mfg. Co.</i> , 420 F.2d 836 (9th Cir. 1969)	6n
<i>Perma Life Mufflers, Inc. v. International Parts Corp.</i> , 392 U.S. 134 (1968)	7
<i>United States v. General Motors Corp.</i> , 384 U.S. 127 (1966)	9
<i>United States v. Masonite Corp.</i> , 316 U.S. 265 (1942)	8n

	PAGE
<i>United States v. Paramount Pictures, Inc.</i> , 334 U.S. 131 (1948)	8
<i>United States v. Singer Manufacturing Co.</i> , 374 U.S. 174 (1963)	8
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978)	8n
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364 (1948)	10, 11
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969)	10, 11
<i>Statutes</i>	
15 U.S.C. §1	3
15 U.S.C. §2	3
<i>Miscellaneous</i>	
Rule 52(a), Federal Rules of Civil Procedure	4, 9, 10

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-644

ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES
and ARCT, INCORPORATED,

Petitioners,

v.

THE DUPLAN CORPORATION, *et al.*,*Respondents.*

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

Respondents¹ submit this brief in opposition to the petition for a writ of certiorari filed by Petitioners Ateliers Roannais de Constructions Textiles ("ARCT-France") and ARCT, Incorporated ("ARCT, Inc."). Respondents are concurrently filing a separate brief in opposition to two petitions for a writ of certiorari, one of which was filed by Deering Milliken Research Corporation ("DMRC") and Moulinage et Retorderie de Chavanoz ("Chavanoz") and the other of which was filed by Deering Milliken, Inc.

¹ The Duplan Corporation, Burlington Industries, Inc., Dixie Yarns, Inc., Frank Ix & Sons Virginia Corp., Hemmerich Industries, Inc., Jonathan Logan, Inc., Lawrence Texturing Corp., Leon-Ferenbach, Inc., Madison Throwing Co., National Spinning Company, Inc., Reliable Silk Dyeing Co., Inc., Schwarzenbach-Huber Co., Spring-Tex, Inc., Texelastie Corporation, Texfi Industries, Inc., United Merchants & Manufacturers, Inc.

("DMI"), in Nos. 79-658 and 79-659. All of these petitions seek review of the same decision below.²

For a full description of the parties and the relevant facts, respondents respectfully incorporate by reference their brief in opposition to the petitions filed in Nos. 79-658 and 79-659. In summary, however, respondents (sometimes hereinafter referred to as "Throwsters") produce yarn by texturing synthetic filaments such as nylon and polyester on false twist machines. Chavanoz, the owner of 22 patents (the "patents in suit") relating to alleged improvements in false twist machines and in the false twist process, granted petitioner ARCT-France, a manufacturer of textile machinery, an exclusive, world-wide license to make and sell false twist machines under those patents.

Since 1959, ARCT-France has sold false twist machines manufactured under the license from Chavanoz to its United States distributors. The exclusive United States distributor of such machines since 1966 has been petitioner ARCT, Inc. which purchased machines from ARCT-France and resold them to United States yarn manufacturers, including the Throwsters.³

Chavanoz purportedly granted to DMRC the exclusive right to use in the United States false twist machines embodying the improvements claimed in the patents in suit. DMRC, in concert with Chavanoz, ARCT-France and its distributors, required the Throwsters to sign a standard,

² Respondents have themselves filed a conditional cross-petition for a writ of certiorari (No. 79-660) seeking review of other aspects of the decision below, but only in the event that this Court grants the petition to which this brief is submitted in opposition or the petitions in Nos. 79-658 and 79-659.

³ From 1959 through 1965, ARCT-France's exclusive United States distributor was Whitin Machine Works ("Whitin"), which is not a party to this litigation. Whitin, too, purchased machines from ARCT-France and resold them to yarn manufacturers.

printed form production royalty agreement, under all of the patents in suit, in order to obtain delivery of the false twist machines that they had purchased from Whitin or ARCT, Inc.

At all relevant times, virtually the entire United States market in false twist machines was shared by petitioners' group⁴ and Leesona Corporation ("Leesona"), a United States manufacturer of, and licensor of patents relating to, false twist machinery. Like petitioners' group, Leesona required purchasers of its machines to sign a license imposing production royalties on each pound of yarn processed on the machines.

Based on several different theories of liability, the district court held that DMRC and Chavanoz combined and conspired with Leesona in violation of Sections 1 and 2 of the Sherman Act. The essence of the antitrust violations found by the district court was that DMRC/Chavanoz and Leesona agreed to maintain their respective and interdependent royalty programs and to stabilize the royalty rates thereunder and that certain joint actions were necessary if those interdependent programs were to continue. Those joint actions included the settlement of a patent dispute for the specific purpose, not of resolving legitimate disputes as to patent coverage, but of insuring that the patents of both would be preserved and the production royalty programs continued.

The district court held that petitioners ARCT-France and ARCT, Inc. were not liable to respondents for those violations. The Court of Appeals for the Fourth Circuit, however, while affirming as to DMRC and Chavanoz on the opinion below, reversed as to petitioners, holding them

⁴ As used herein, the term "petitioners' group" includes not only petitioners ARCT-France and ARCT, Inc. but also DMRC and Chavanoz.

fully liable for their role as "active, knowing participants in the horizontal conspiracy." (A416).

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, dated March 26, 1979, is reported at 594 F.2d 979. The opinion of the District Court for the District of South Carolina, dated July 29, 1977, is reported at 444 F.Supp. 648. These opinions, as well as findings of fact expressly adopted by the district court, are reproduced in the Joint Appendix filed by petitioners.

Question Presented

The question presented by petitioners ARCT-France and ARCT, Inc. is simply not involved in the present case. Here, the court of appeals held that petitioners' conduct made them parties to an antitrust combination and thereby reversed the contrary *conclusion* of the district court.

Under these circumstances, the question presented should be framed as follows:

Is the conclusion of the district court that petitioners were not parties to an antitrust combination shielded by the 'clearly erroneous' test of Rule 52(a) of the Federal Rules of Civil Procedure?

Statement of the Case

In appealing to the court of appeals from the district court's ruling that ARCT-France and ARCT, Inc. were not participants in the unlawful horizontal antitrust combination among DMRC, Chavanoz and Leeson, the Throwsters did not attack the findings of fact of the district

court. Indeed, the Throwsters relied on those findings, which are summarized below, and argued that they established petitioners' liability as a matter of law.

With respect to ARCT-France, it was a signatory to the 1964 agreement which the Court of Appeals characterized as "the core of a scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines" (A417).⁵ Moreover, the district court expressly found that ARCT-France actively participated in carrying out the various agreements among petitioners' group to restrict delivery of ARCT machines to Throwsters who had signed a standard DMRC royalty agreement (A14, 16, 18-21, 27-28, 32). That restriction—the key to the DMRC/Chavanoz royalty program—was, in turn, part and parcel of the horizontal combination with Leeson. Indeed, enforcement of the restriction by petitioners' group was essential to the successful operation of the combination. As fully discussed in our brief in opposition in Nos. 79-658 and 79-659, the objective of that combination was the perpetuation of the two interdependent royalty programs. As the parties perceived, communicated and agreed, one program could not work without the other and the DMRC program simply could not have continued without the active cooperation of ARCT-France in keeping machines out of the hands of non-licensees. The importance of the restraint is most graphically demonstrated by the following finding of the district court: While the restraint was in effect, everyone

⁵ Although ARCT-France was represented by Leo Soep in connection with the negotiation and execution of the 1964 agreement, the district court ruled that Soep's "guilty knowledge and intent . . . were not necessarily imputable to ARCT-France" because his "primary allegiance" to Chavanoz gave rise to a "conflict of interest situation." (A80). As discussed below, however, that conclusion of the district court is legally erroneous in light of the fact that Soep was a fully authorized representative of ARCT-France and that ARCT-France was aware of Soep's dual role.

was licensed; when it was abandoned, no one signed a license (A28-29, 345-46).

The findings of the district court also linked ARCT, Inc. to the combination and rendered it liable as a participant. Thus, the district court expressly found that ARCT, Inc., upon its organization in 1966, undertook to conform to the previously established arrangements to restrict delivery of ARCT machines to those who had signed the standard DMRC royalty agreement and "did in fact so restrict delivery." (A20).⁶ As noted above with respect to ARCT-France, the role of ARCT, Inc., as United States distributor of the machines, was crucial to the success of DMRC and Chavanoz in maintaining their own licensing program and keeping machines out of the hands of non-licensees. Moreover, it is clear that ARCT, Inc. knew that its cooperation in effectuating the licensing restraints was, in turn, absolutely essential to the success of the combination among petitioners' group and Leeson to stabilize and maintain their respective production royalties (A417-18). Robert F. Waters, the chief executive of ARCT, Inc. since its formation in 1966, had recognized the interdependence of the two programs while he had been associated with Whitin and knew the role it played in the deliberations concerning settlement (*see, e.g.*, A315-17, 331). In 1969, for example, Waters, as the district court found, admitted to Duplan that:

They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leeson] patents out, but in this case there would have been no royalty

⁶ Even though ARCT, Inc. was not in existence at the time the combination began, the law is clear that one who joins a pre-existing combination or conspiracy is liable for all of the acts of that combination *ab initio*. *See, e.g., Hays v. United Fireworks Mfg. Co.*, 420 F.2d 836 (9th Cir. 1969).

collected by Leeson which would have made it all the harder for ARCT to collect *any* royalty (A331).

Despite these findings, the district court exonerated ARCT-France and ARCT, Inc. from liability, basing that legal conclusion on its findings that (a) Soep was acting in a dual capacity at the time the conspiracy was formed, (b) the two ARCT companies did not derive the same benefit from the conspiracy as the other defendants, and (c) there was some "friction and antagonism" between the ARCT companies and the others in petitioners' group concerning the DMRC licensing program (A77-80).

The Throwsters argued, and the Fourth Circuit held, that, as a matter of law, these findings were not exculpatory and, therefore, did not support the legal conclusions of the district court. First, Soep's dual capacity, as a representative of both ARCT-France and Chavanoz, was always fully known to ARCT-France which, nevertheless, continued to entrust him with its affairs regarding ARCT sales in the United States. Under these circumstances, there is no basis for applying any exception to the general rule that an agent's knowledge is imputed to his principal. *See Eitel v. Schmidlapp*, 459 F.2d 609 (4th Cir. 1972). Second, it is not necessary that all conspirators be similarly motivated or benefit from a conspiracy in the same manner or, indeed, that they benefit at all. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968).⁷ Third, the friction and antagonism that existed

⁷ Although it was of the opinion that a finding of benefit to the ARCT companies was unnecessary to establish liability, the Fourth Circuit held the district court's conclusion that the ARCT companies realized no benefit from the conspiracy clearly erroneous because the evidence conclusively showed that their cooperation was an implied condition to their continuation in business. This was the

(Footnote continued)

between the ARCT companies and DMRC are legally insufficient to negate the existence of a conspiracy or participation therein. In *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 193 (1963), this Court rejected as a matter of law the district court's "inference that the attitude of suspicion, wariness and self-preservation of the parties negated a conspiracy." Likewise, that the actions of ARCT-France and ARCT, Inc. may have been reluctant (or even if they had been coerced) is simply no defense, as the court of appeals stated, citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948).

Having determined as a matter of law that the facts relied upon by the district court in the present case were not exculpatory,⁸ the court of appeals held that execution by ARCT-France of the settlement agreement itself, the full knowledge possessed by representatives of both ARCT companies and the active cooperation of the ARCT companies in restricting machine deliveries to DMRC use licensees—which was essential to the successful "day-to-day operation" of the "scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines"—established their liability as co-conspirators in the horizontal combination with Leesona (A417-18).

(Footnote continued)

only "clearly erroneous" holding of the Fourth Circuit and it was plainly based on the lack of substantial evidence to support the district court's conclusion.

⁸ The district court's exoneration of petitioners rested on another erroneous premise not expressly discussed by the court of appeals. The district court found that the evidence was insufficient to establish that ARCT-France intended to violate the antitrust laws. In a civil case, however, such an intent—indeed, any guilty intent at all—is unnecessary to a finding of liability. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); see *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942).

Reasons Why the Writ Should Be Denied

I.

The Decision of the Fourth Circuit Court of Appeals Does Not Raise the Question Presented in the Petition.

As explained above, the Throwsters, in their appeal to the court of appeals, did not challenge the findings of the district court. Rather, the issue presented to, and decided by, the court of appeals was whether the findings of the district court established, as a matter of law, the liability of ARCT-France and ARCT, Inc. as participants in the antitrust combination among DMRC, Chavanoz and Leesona. The court of appeals concluded that ARCT-France and ARCT, Inc. were participants in that combination and thereby reversed the contrary conclusion of the district court.

Under these circumstances, the decision of the court of appeals is not controlled by Rule 52(a) of the Federal Rules of Civil Procedure. As this Court stated in *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966):

We note that, as in *United States v. Parke, Davis & Co.* . . . the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure. . . . As in *Parke, Davis* . . . the question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case.

Thus, it is clear that the court of appeals' decision on the combination issue presents no question concerning the construction and application of Rule 52(a).

II.

There Is No Conflict Among the Circuits Concerning the Scope and Application of Rule 52(a).

Even if Rule 52(a) were somehow applicable to the decision of the court of appeals, there would be no occasion for this Court to review that decision here on the basis of a conflict among the circuits concerning the scope and application of the Rule.

The definitive test for applying the "clearly erroneous" standard of Rule 52(a) was stated by this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948):

A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Accord, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

ARCT-France and ARCT, Inc. admit that the Fourth Circuit applies the *Gypsum* test (Pet. at 10-11). Nevertheless, they argue that this Court should grant their petition because some other circuits have allegedly ignored the *Gypsum* test by ruling that findings of fact supported by evidence will never be set aside. It would appear, however, that the lack of uniformity perceived by ARCT-France and ARCT, Inc. is more a difference in emphasis, resulting

from the decision reached in a particular case, than a substantive conflict.

In any event, even if there is a substantive conflict among the circuits, there is no conflict between the Fourth Circuit's decision in the present case and this Court's controlling decisions in *Gypsum* and *Hazeltine*. There can be no doubt that the Fourth Circuit was left with the definite and firm conviction that a mistake had been committed by the district court with respect to the liability of ARCT-France and ARCT, Inc. Therefore, to the extent that there is a conflict among the circuits, that conflict should be resolved in a case from a circuit that does not follow the decisions in *Gypsum* and *Hazeltine*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by ARCT-France and ARCT, Inc. should be denied.

Dated: December 7, 1979

Respectfully submitted,

DAVID L. FOSTER
WILLKIE FARR & GALLAGHER
153 East 53rd Street
New York, New York 10022
(212) 935-8000

MCNEILL SMITH
SMITH MOORE SMITH
SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450

Attorneys for Respondents

Of Counsel:

MICHAEL R. ABEL
MICHAEL C. LAMBERT
JAMES J. CALDER
JOHN W. MALLEY
WILLIAM K. WEST, JR.
W. WARREN TALTAUVLL
PAUL B. BELL
CHARLES B. PARK
JOHN J. BARNHARDT, III
DAVID RABIN

es

97

8

9

0

1

2

3

4

5

6